

Before the  
POSTAL REGULATORY COMMISSION  
Washington, DC 20268-0001

Complaint of the Greeting  
Card Association

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Docket No. C2020-2

GREETING CARD ASSOCIATION ANSWER  
TO POSTAL SERVICE MOTION TO DISMISS

In this pleading, the complainant Greeting Card Association (GCA) replies to the motion to dismiss filed on February 19, 2020, by the United States Postal Service. The Postal Service's motion should be denied, since the complaint raises material issues of law and fact.

*The statute governing complaints.* Section 3622(b)(1)(A), the Commission may take one of two courses: (i) if it finds that "such complaint raises material issues of fact or law, [it shall] begin proceedings on such complaint" or (ii) it may dismiss the complaint. In either case, the Commission issues a written statement of "the bases of its determination." The Commission's Rules of Practice track these requirements (see especially 39 CFR sec. 3030.30).

GCA is also responding to two other motions to dismiss, filed by Pitney Bowes, Inc., and National Postal Policy Council. There is substantial commonality in the issues raised by the three motions, and GCA respectfully requests that the Commission consider responses in this Answer in relation to the other two motions, and conversely, insofar as that is helpful.

Contrary to the assertions of the Postal Service's motion, GCA's complaint raises material issues of law and fact.

## I. SIMILARITY OF SITUATION

The Postal Service begins with an argument that GCA has not shown business and households to be similarly situated. We agree that similarity of situation is an element of an undue discrimination claim. Our disagreement is over whether we have demonstrated it. For reasons explained next, we have.

*GCA's showing that there are different customer groups between which price discrimination exists.* In explaining our claim, we first showed that household mailers cannot, for strong practical reasons, make use of meters.<sup>1</sup> This is necessary in order to show that there are two identifiable groups of customers who are made to pay different rates for the same product. (This, according to Commission Order No. 718, quoted by the Postal Service at p. 6 of its motion, is the first of three prerequisites for an undue discrimination claim.) We observed that if the *only* difference were that household mailers use stamps and businesses, by and large, use meters, it would be possible to argue that the two groups are not really different. A household (probably an imaginary one) with sufficient originating volume to justify the cost of a meter would acquire one, while a markedly low-volume business might retain or switch to stamps if doing so would save it money. In those scenarios, the remedy for any discrimination would simply be to change postage-evidencing modes. There would be no economic, or legal, reason for the Commission to intervene.

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<sup>1</sup> GCA Complaint, pp. 10-13 and, particularly, fn. 24 on p. 13.

Thus the Postal Service's assertion<sup>2</sup> that "GCA concedes this point directly" is not accurate. That the customer groups are distinct, as we showed, does not mean that they are not similarly situated.

*The Postal Service's argument nullifies sec. 403(c).* The logic of the Postal Service's argument, however, would lead to a state of affairs in which *no* claim of undue discrimination could survive a motion to dismiss. It seems to be common ground that there must be two different customers, or groups of customers, for there to be a logical possibility of discrimination (lawful or otherwise). If the facts establishing that such groups are distinct are then taken, as the Postal Service takes them here, to show that the groups are not similarly situated, then a viable claim of discrimination is impossible. Under the Postal Service's reasoning, either there are not two distinct customer groups facing different prices (the first prerequisite listed in Order 718) or, if there are, then they are not similarly situated (the second prerequisite). The argument, in other words, effectively makes sec. 403(c) a nullity, and the Commission's sec. 3662 authority to enforce it unusable.

*Common use of First-Class Single-Piece Letters.* The Postal Service, having erroneously taken this demonstration of distinct groups who are offered different prices to show that households and businesses are not similarly situated, states that GCA's only showing of similarity is that both sets of customers use the same product: Single-Piece First-Class Letters. This, it says, is not enough to show similarity of situation.

*Similarity of situation demonstrated.* GCA's complaint shows that the two groups it has identified are similarly situated by virtue of using – and having no choice but to use – the same Postal Service product. Both groups of customers are required to use

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<sup>2</sup> Postal Service Motion, p. 8.

First-Class Single-Piece Letters for bills and statements of account, messages containing personal information<sup>3</sup>, or anything handwritten or typewritten. *Domestic Mail Manual* 133, 3.2 to 3.4. We showed that, except for the mode of postage evidencing, the product is identical for both groups.<sup>4</sup>

The Postal Service relies on Order No. 718 in Docket C2009-1 as requiring that inquiry into similarity of situation focus on “relevant” factors confirming or disconfirming similarity. It is important that Order 718 dealt with a situation in which the complainant was *not* using the same product used by the alleged beneficiaries of the discrimination.<sup>5</sup> Despite this fact, the Commission found the complainant and the alleged beneficiaries similarly situated.<sup>6</sup> Here the two groups do use the same product – because they must – and are thus similarly situated. The issue the Commission faced in Order 718 involved the complainant’s “choice” of a *different* product than the one used by the alleged beneficiaries. In our situation there is no choice. To use a practical illustration: how is a householder mailing a \$100 telephone bill payment<sup>7</sup> using an adhesive stamp differently situated from small businessperson mailing a \$100 telephone bill payment using a meter strip?

One difference (which GCA demonstrated as showing the distinctness of the two customer groups) is in originating volume. The Postal Service cites it as supposedly negating similarity of situation.<sup>8</sup> The difference in volume does not make the two groups

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<sup>3</sup> The *DMM* makes it clear that “personal information” means anything specific to a particular person. Thus a birthday card sent to a cousin would constitute personal information, simply by virtue of being “specific” to her. *DMM* 133 3.3. And because the mailer had signed it, it would also contain handwritten material. *Id.*, 3.4.

<sup>4</sup> *GCA Complaint*, pp. 11-13.

<sup>5</sup> GameFly, Inc., was mailing its DVDs as flats while Netflix and Blockbuster used letter service and received hand processing to avoid the breakage which concerned both them and GameFly.

<sup>6</sup> See particularly Order 718, ¶ 4087.

<sup>7</sup> We showed (*Complaint*, p. 12, fn. 20) that bill payments are the largest component of household-origin mail (3.10 billion of 5.35 billion pieces in FY 2018).

<sup>8</sup> *Postal Service Motion*, p. 8.

dissimilarly situated, any more than the difference in originating volume between GameFly and Netflix, examined in Order 718, ¶¶ 4115-4120, precluded a finding that they were similarly situated.

The Postal Service argues that the use by both groups of Single-Piece First-Class Letters is not enough to show that they are similarly situated; it cites Order 718 at p. 49 in support of this contention. The Order 718 situation is distinguishable. The Service's argument there was that the use of *First-Class Mail* was insufficient to show that GameFly and Netflix/Blockbuster were similarly situated. GameFly mailed First-Class flats while the others mailed First-Class letters. These different shapes are also different First-Class products. Single-Piece Letters, relevant here, is a single product with two different first-ounce rates; the difference is the subject of this complaint.

To summarize: the Postal Service has not negated the proposition that businesses and households are similarly situated for purposes of this complaint. GCA has, accordingly, established the second of the three prerequisites for a claim of discrimination.<sup>9</sup>

## II. THE QUESTION OF RATIONAL BASIS

The Postal Service says, and we agree, that the third necessary element for a successful claim of undue discrimination is that the discrimination lack a rational basis. Here, our disagreement is over whether we have made that showing.

A basic question for the Commission is how far the existence of a basis for a pricing decision arguably rational *at the time it was made* may continue to protect that decision against a claim that its subsequent history demonstrates that that basis (if it

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<sup>9</sup> It seems to be undisputed that the first prerequisite – two customer groups of which one receives less favorable treatment than the other – has been satisfied. *Postal Service Motion*, p. 7.

was rational to begin with) has disappeared. A pricing decision, for the Postal Service or any other business, is not immutable – or at least should not be. If background conditions change, it may be necessary to change the pricing decision too. The same is true if expectations of benefit from the pricing decision, even if reasonable ex ante, are disappointed in practice. And still another possibility – important here – is that the original pricing decision may be expanded to the point where benefits, perhaps reasonably anticipated at the outset, are swamped by the unfavorable revenue effect of the expansion. It bears repeating that a pricing decision is not the sort of irreversible event (like, e.g., abandonment of a railroad line) which the firm and its customers must live with even if it turns out badly.

A real-world example may make this clearer. In Docket R2006-1, the Postal Service proposed to eliminate the carrier route discount from First-Class Automation Letters. It stated that not only had carrier route volume fallen, but the sortation had “little or no value” to the Postal Service because of the advent of delivery point sequencing. The Commission agreed.<sup>10</sup> This is an example of a pricing decision, rational when made – i.e., when carrier route sortation materially benefited the Postal Service – that had ceased to be useful when background conditions changed, and so was duly reversed.

The Postal Service cites several Commission decisions as showing that the necessary rational basis does, or at least did, exist. The most recent of these, for reasons just explained, is the most relevant. This is Order No. 5285 (Docket R2019-1). Order 5285 repeatedly states that the Metered Letter differential is justified because Metered Letters are less costly to process. That is true, as GCA’s complaint recognizes. What was not before the Commission in that proceeding was a quantified comparison of the cost saving with the size of the differential. In Docket R2019-1 the differential, originally

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<sup>10</sup> PRC Op. R2006-1, ¶¶5176-5179.

\$0.01, was increased from \$0.03 (approximating the saving in volume variable<sup>11</sup> processing cost) to \$0.05 (more than one-and-one-half times the volume variable processing saving).

The major change in the relationship between the differential (\$0.01 when introduced in Docket R2013-10) and the difference in cost between Stamped and Metered Letters is a good example of the kind of change over time which may make a past pricing decision inappropriate and, in circumstances like those here present, unduly and unreasonably discriminatory. GCA is asking the Commission to consider the *present* conditions produced by the differential in its present form. In this connection, GCA disputes the Postal Service's assertion in section IV of its motion that we have filed our complaint "without referring the Commission to any changed circumstances that would call the Commission's prior conclusions into question." If nothing else, the fact that the differential now greatly exceeds the difference in cost refutes this assertion.

*Rational basis.* The "rational basis" cited in Order 5285 included findings that the differential promoted more efficient mail (not requiring all the same processing operations) which avoided costs associated with stamp production and distribution, and that it would deter migration of eligible mail to e-media. These are no doubt relevant considerations, but were discussed in a generalized manner and evidently not geared to present conditions. The pricing decision considered generally may be thought rational, even when in present-day actuality it is producing undesirable results. The Postal Service's argument is at the same generalized level; it sums up by saying that "[b]ecause GCA cannot establish that the Postal Service *did* not have a reasonable basis for differentiating rates, it cannot state a claim for discrimination[.]" (Italics added.) GCA asks the Commission to inquire whether that reasonable basis exists *now*. We believe it does not.

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<sup>11</sup> This is only one element of the total cost difference between Stamped and Metered Letters; we cite it here merely because it is the only one directly reported by the Postal Service. Section II.E. of the complaint, starting on p. 17, presents the detailed analysis of the cost difference using that and various other cost elements as comparators.

### III. THE DIFFERENTIAL IN RELATION TO COST DIFFERENCE

GCA demonstrated<sup>12</sup> that the Metered Letter differential exceeds the cost difference between stamped and metered letters by at least 58 percent and possibly as much as 480 percent. The Postal Service argues that this demonstration “cannot save” the complaint.

This argument seems to reduce to two propositions: (i) the Metered Letter rate is not a workshare discount subject to sec. 3622(e); and (ii) there is no other statutory or regulatory provision forbidding it to exceed the cost difference. From this the Postal Service concludes that our demonstration is irrelevant.

We agree with proposition (i), but not with proposition (ii). First, the Postal Service is incorrect in stating that GCA “does not reference any legal requirement” that the differential equal cost difference. Section II.E. of the complaint contains our demonstration, and at p. 21 we tie that demonstration to sec. 403(c) – surely a “legal requirement.” Sec. 403(c) forbids undue and unreasonable discrimination. We explain that its being substantially greater than the cost saving is one reason why the Metered Letter differential is unreasonable: it forces non-eligible customers to bear a greater and undue portion of operating costs. We go on to explain that an unfavorable relation to cost difference plays a different role in a sec. 403(c) inquiry than it would under sec. 3622(e). The Postal Service’s tacit assumption that to be legally objectionable such a relationship must be specifically named in a statutory or regulatory provision should be rejected.

### IV. SUCCESS OR FAILURE OF THE DIFFERENTIAL

Here we seem to have a fairly straightforward factual dispute over whether the volume statistics GCA has used do or do not demonstrate that the Metered Letter rate has not increased Metered Letter volume. This, we agree, is a material issue; for that

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<sup>12</sup> Complaint, section II.E, starting on p. 17.



reason, among many others, the complaint is appropriate for Commission decision. It bears repeating that failure to achieve its stated objective is not the only reason to find that the Metered Letter differential is an undue and unreasonable discrimination. This is so because the concluding sentence of section B.3 of the motion appears to ask the Commission to dismiss the complaint because of GCA's alleged failure to prove this proposition.

Some observations are in order with respect to the Postal Service's statement at p. 12 of its motion that GCA's "own Exhibit 7 shows that there have been gains in meter volume since 2014." In fact it shows no such thing. The apparent uptick in metered volume between FY 2014 and FY 2015 is explained in Chart C and associated text. It is no more than an artifact of the data source (Postal Service Billing Determinants): the period after the introduction of the Metered Letter rate in Q2 of FY 2014 shows an uptick in Metered volume because before that rate was established "Metered Letter volume" had no statistical existence in the Billing Determinants system. Chart C, which uses RPW data, demonstrates that Metered volume did not increase in 2014. Since 2014, as charts B and D show, Metered Letter volume has shared in the general decline of Single-Piece letters. This is clearly explained in the complaint.

## V. PAST COMMISSION DETERMINATIONS

This issue must be considered in light of the controlling nature of sec.403(c), which we showed is a direct Congressional command to the Postal Service, so that a rate violating it is (in the Commission's Order 536 terminology) "out of bounds." The Postal Service states that it "does not necessarily dispute" the proposition that objective (b)(4) cannot save a rate which contravenes sec. 403(c). We would add that if this is true of (b)(4) it must also be true of the other sec. 3622 objectives, none of which is paramount over the others. In each case sec. 403(c) retains its character as a Congressional command addressed to the Postal Service as an unqualified requirement, and not to the Commission's discretion.

It is true that the Commission has more than once issued ACDs which included statements that the rate in issue satisfied the requirements it considered. It is also true that in none of these cases did the Commission have before it a comprehensive demonstration like that presented in the GCA complaint on which it could find – as we believe it now should – that the Metered Letter rate violates sec. 403(c).<sup>13</sup> The most significant fact, however, is that if the Commission does find that the Metered Letter differential is unduly and unreasonably discriminatory, it cannot find that it also is an appropriate exercise of pricing flexibility (objective (b)(4)) or a component of a just and reasonable rate schedule ((b)(8)).

## VI. THE QUESTION OF PRESORT RATES

In section III of the complaint, GCA discusses the problem presented by Presort rates. We argued that (i) Presort rates are based on the Metered Letter rate functioning as a benchmark, (ii) the Metered Letter rate does not correspond to cost but underrepresents it, (iii) therefore Presort rates are not – as they should be – reflective of the cost avoided by the Postal Service by reason of the relevant worksharing.

Proposition (i) in the preceding paragraph is presumably not controversial. If we have established proposition (ii) – and the Postal Service, in arguing that the differential need not be cost-based, at least does not contest it – then proposition (iii) seems to follow.

GCA is explicitly *not* complaining against Presort rates, for reasons explained in section III.A. of the complaint. We made two remedial suggestions: (i) base Presort rates on a *cost* benchmark (as contemplated by Order No. 1320) – the obvious course if the Metered Letter rate were abolished, or (ii) set a surviving Metered Letter rate equal to the cost difference, so that the Presort rates computed from it would approximate with

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<sup>13</sup> In the FY 2013 ACR, APWU's invocation of sec. 403(c) was, by comparison, conclusory and non-factual.

reasonable accuracy the total cost saving due to the worksharing.<sup>14</sup> The latter course would not require “reconsideration of . . . Metered Letters as the appropriate benchmark for Presort rates.”<sup>15</sup> There is no need for the Postal Service, in this proceeding, to defend the Presort rates since we are not attacking them.

## VII. CONCLUSION

We have shown in the body of this Answer that GCA’s complaint raises material issues of law and fact. For the reasons set forth in this Answer, GCA respectfully requests the Commission to deny the Postal Service’s motion to dismiss.

February 26, 2020

Respectfully submitted,

GREETING CARD ASSOCIATION

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<sup>14</sup> Complaint, p. 33 and paragraph B. of section IV.

<sup>15</sup> *Postal Service Motion*, p. 16.

## CERTIFICATE OF SERVICE

I certify that I have today served the foregoing pleading in a true and correct copy, via the Commission's Filing On Line system and by individually addressed electronic mail, upon

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